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DEBATING "BEYOND HUMAN RIGHTS" SYMPOSIUM

## Beyond Human Rights: Beyond a Convertible Vattelien?

ZORAN OKLOPCIC — 18 January, 2016



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Anne Peters' *Beyond Human Rights: The Legal Status of the Individual in International Law* is an impressive scholarly intervention, which can be read both as a standalone contribution to the debates about the position of the individual in international law, as well as a companion to

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Peters' previous work on global constitutionalism and the constitutionalization of international law.

### Three registers of international legal theory

In a way similar to a number of recent monographs that contribute simultaneously to international legal doctrine and international legal theory, Peters' argument operates in three registers. The first is *descriptive*, as Peters seeks to "describe and systematize" the expansion of individual rights and duties in international law "in a legally meaningful way". The second register is *polemical*, as Peters also seeks to evaluate this development, and put in its place recent "assertions of a novel Statism" fed by recent "political disappointments" with Western "'abuses'" of international law. Here, Peters offers a "scholarly analysis" that seeks to provoke a "tension" in the claims of statist neo-Vattelians, defend the "global legal *acquis individuel*", and, finally, defend the claim that "the time has come for the international individual right". The first two set the scene for the third—*ethico-political*—register of Peters' argument. The rhetorical purpose of the excavation of past theoretical arguments in favour of international legal status of the individual, together with the survey of the occasional recognition of such status in legal practice (in Chapter 2), is not simply to demonstrate the thoroughness of Peters' engagement with the *problematique*, but to also contribute to the credibility of her ongoing ethico-political project: a "*ius cosmopoliticum*" based on "normative individualism" and the international rule of law grounded in liberal principles of legality.

Rather than engaging the specifics of Peters' argument in the first or the second register, the aim of this brief comment is

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to interrogate the intended (or unintended) reach of the style of the argument which blends the (re)construction of disciplinary developments with normative argumentation and political vision. In other words, while Peters purports to offer a “scholarly analysis”, it is nonetheless fair to ask who *stands a chance* of being persuaded by it. While she pits her arguments against contemporary dignifiers of statism in international law, one could argue that only a relatively narrow subset among them could be converted to a position of *ius cosmopolitanum*.

### ***Ius cosmopolitanum*: only for the bourgeois?**

Peters is largely aware of these challenges. She prefaces the English edition of *Beyond Human Rights* with a recognition of the fact that “non-Western States and cultures ... have their own views on the meaning of human rights”. In Chapter 17, she indirectly returns to those perspectives by conceding in part to the “communitarian” critique, immediately qualifying it by claiming that “the exaggeration of individual rights seems much less an issue on the level of international law where rights (of humans) are anyway still the exception and sparse”.

The “anyway” in her response points to a problem, however. Peters’ project in its totality is implicated in the affirmation of a certain political trajectory where the rights of humans in international law are not exceptional and sparse, but ubiquitous. While Peters’ book is not devoted to the institutional blueprint of *ius cosmopolitanum*, its fragments are nonetheless discernible in her argument. For example, in discussing the possibilities for the political participation of individuals in the international arena she observes that “[t]he individual is not yet able to play the part of an

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international citizen [and that] a universal constitutional democracy, in which [she] is not only vested with international rights and duties but also is (directly) represented ... *is still far away*" [emphases mine]. At the end of the book, the overarching ethico-political frame of the project becomes fully visible. "Universal constitutional democracy" is not a placeholder for Vattelienism tamed by international individual right, but rather a vision of the world where "politics and law ultimately should be guided and justified by the concerns of the people affected by them".

The question of who can be expected to be persuaded by the polemical and ethico-political registers of Peters' argument arises not only in the context of the general ethico-political frame of her analysis, but also in the context of her ancillary commitments that accompany "universal constitutional democracy". In the former, it is difficult to expect that radical critics of international law, or of the idea of constitutionalism, or of Kantian political geography, might embrace the project of "*ius cosmopolitanum*". More interesting, however, is a *narrower* question: What *kind* of a Vattelienist may be persuaded by Peters' argument?

From that point of view, it seems that the second and the third register of Peters' argument partake in a family quarrel between liberal-democratic nationalists and liberal-democratic cosmopolitans, both of which approach the socioeconomic sphere from a "market economic perspective". From this perspective—explicitly embraced by Peters—"the economic power of private capital is not structurally comparable to the political apparatus of the State responsible for public welfare". In my mind, that claim is dubious and can be unpacked on its own. What is more important for the purposes of this short comment is that it

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implicates universal constitutional democracy-to-come in a muted apology of global capitalism, where “international regulation of the enterprise should not amount to an inhibiting restriction of entrepreneurial freedoms that are in turn protected by fundamental rights (economic freedom and property rights).”

It seems then that the second and the third register of Peters’ argument will most powerfully influence a particular kind of Vattelien statist—a “global bourgeois”, as Peters’ herself calls him—whose political sentiments are malleable enough to shift from nationalism to cosmopolitanism, but who is otherwise staunchly capitalist. For those who are not willing to discard the emancipatory promise of universal constitutional democracy out of hand, however, Peters’ implicit embrace of global capitalism opens interesting questions. Is it possible to imagine a non-capitalist non-liberal democratic *ius cosmopoliticum* without reliance on entrepreneurial freedoms and property rights? Or are we, in buying “global individual acquies” also buying into the perpetuation of (perhaps tamed and constrained) global hegemony of neo-liberalism?

### **What kind of democracy in ‘universal constitutional democracy’?**

Peters’ answer, I suspect, would be *not necessarily*. As she stresses, rights have both a practical utility as well as an emancipatory, “reality-shaping character”. Optimistically, one can imagine that global capitalism may be tamed through “transnational multistakeholder initiatives and public-private partnerships” and the participation of non-state actors in “transnationalized negotiation processes”. Even more optimistically, one could imagine that a “dual

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democracy”—where one track is reserved for individual political participation at the international level—might contribute not only to further erosion of global capitalism, but also to the erosion of the political structures that sustain it.

One of the principled problems with this—not necessarily Peters’—vision of the emancipatory potential of internationalized, (Kantian) democracy is that it is *reactive*, destined to perpetually lag behind, what Karl Rove called “a reality-based community” and its factual imposition of ever new patterns of affectedness. Peters seems to be aware of that risk. In her discussion of novel ways of transnational political participation, she recognizes that those who participate in innovative consultation processes on the grounds of affectedness are “not empowered to initiate a project themselves”. However, she sidesteps the fundamental ethico-political importance of that question, arguing that “[i]t is a question of legal theory whether the social actors should be deemed to have original power to create law”. The problem with this answer is that it suggests that actors’ *pouvoir constituant* should be treated as a theoretical puzzle that can somehow be “resolved”, and not for what it is: part of an ethical, political—and why not, poetic—commitment to a broader vision of our political world.

Put differently, outside of the audience of capitalist, cosmopolitanist *convertible Vattelians*, the persuasiveness of *ius cosmopoliticum* will depend less on adducing evidence of its traces in intellectual history and past legal practice than on offering a vision of the role of both reformist and insurgent collective action, and its relationship with global socioeconomic and ethno-cultural diversity. In the book,

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Peters dismissed politically inflected critiques of rights, such as Tushnets, as impervious to “any legal argument”. If I am right, however, engagement with international legal theory should likewise be attuned to their ethico-political minor key, irrespective, or in addition to, their doctrinal contribution. Given that Peters makes clear that her argument bracketed the treatment of topics such as self-determination—which would perforce have to address the question of “original power” to create law—my remarks cannot be taken as an objection against the scope and the architecture of *this* book. Nonetheless, in light of Peters’ previous work on self-determination—which, she argued, only “technically” belongs to collectivities—and her awareness of the problem of “original power” exemplified in this book, I admit that it would be exciting to see those threads brought together in her future work.

### **International legal theory: beyond three registers?**

Beyond these specific reflections, the aim of my brief comment was wider, oriented towards rethinking the styles of engagement in international legal theory in general. In more explicitly speculating on who stands to be persuaded—convertible “bourgeois” Vattelians, global constitutionalists, Marxists, TWAIL-ers, constitutional pluralists, legal nihilists, or someone else altogether—international legal theorists would not only more systematically engage the question of their (un)intended audiences and the ethical and political purposes of international legal theorizing, but might also reconsider the distribution of their intellectual efforts: from fortifying defenses of their own projects towards building precarious pontoon bridges among them.

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